

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation On The Commission's Own Motion
Into The Santa Clara Valley Transportation
Authority's Refusal To File An Application For
The Widening Of I-880 Over The Authority's
Light Rail Line At North First Street In The City
Of San Jose, California, As Required By
California Public Utilities Code Sections 1201
et. seq. and 99152, And Order To Show Cause
Why The Authority Should Not Be Ordered To
File An Application For Commission Approval.

Investigation 03-09-030
(Filed September 18, 2003)

Benjamin H. Scharf, Attorney at Law,
for Santa Clara Valley Transportation
Authority, respondent.

Patrick S. Berdge, Attorney at Law, for Rail
Crossing Engineering Section.

**OPINION REQUIRING SANTA CLARA TRANSPORTATION
AUTHORITY TO FILE AN APPLICATION FOR SAFETY
REVIEW OF FUTURE CONSTRUCTION OR MODIFICATIONS
OF ITS LIGHT RAIL TRANSIT SYSTEM**

1. Summary

Pursuant to Pub. Util. Code¹ § 99152 and General Order (GO) 143-B,² the Commission orders Santa Clara Valley Transportation Authority (VTA) to file an application for safety review of future construction and modifications of its light rail transit (LRT) system. The Commission rejects VTA's contention that under its enabling act³ and a relatively recent Commission decision in a complaint proceeding,⁴ VTA has the threshold authority to determine whether any new construction or modifications of its LRT system, including crossings, sufficiently impacts safety as to justify an application to the Commission under § 99152.⁵ The

¹ All statutory references are to the Public Utilities Code unless otherwise stated.

² GO 143-B and its application requirement were expressly established by the Commission to implement its light rail transit safety jurisdiction. Section 1.02 of GO 143-B provides: "These rules and regulations are authorized by and implement the provisions of Sections 778, 29047, 30646, 99152, and 100168 of the Public Utilities Code." Hence, the GO 143-B application requirement was not implemented pursuant to the Commission's § 1202 exclusive railroad crossing jurisdiction, which as discussed below, does not apply to VTA.

³ Pub. Util. Code §§ 100000 *et seq.*

⁴ *Brown v. Santa Clara Transportation Agency, et al.*, Decision (D.) 94-10-009, 56 CPUC2d 554 (1994).

⁵ Section 99152 provides:

Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulation of the Public Utilities Commission relating to safety appliances and procedures.

The commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.

The commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators

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Commission holds that while VTA is free to “construct, own operate, control, or use rights-of-way, rail lines, bus lines, stations,” etc. (§ 100161(a)), it does so subject to the Commission’s statutory safety oversight, and the Commission cannot delegate its authority in this matter.

VTA generally agrees that major crossing modifications, including expansions, technical enhancement and rebuilds, are subject to Commission review under either the formal application process or General Order (GO) 88-B. However, it is the marginal cases where there is no such agreement. VTA contends that for minor modifications it should not have to file a formal application where 1) there are no safety problems, or 2) any safety problems identified by Staff can be corrected, thereby obviating the need for an application.

The Commission agrees with VTA on the desirability of avoiding unnecessary formal proceedings for safety review of minor modifications to LRT systems. To address these concerns, the Commission directs the Commission’s Consumer Protection and Safety Division (Staff) to prepare a resolution recommending that the Commission waive the application requirement where Staff and VTA have agreed that the modification in question does not present a safety issue, or Staff and VTA have agreed on how to deal with that issue. Where there is no agreement between Staff and VTA on safety issues involving minor modifications, then VTA should file a formal application for adjudication of the issue by the Commission.

This proceeding is closed.

in the design, construction, and operation of those guideways.
Existing industry standards should be used where applicable.

2. Procedural Summary

On September 18, 2003, the Commission issued its Order Instituting Investigation (OII) and Order to Show Cause regarding VTA's refusal to file an application with the Commission for the widening of its overpass at North First Street, in the City of San Jose. On October 16, 2003, VTA filed its response to the OII, and appeared at a hearing on that date. On October 28, and November 24, 2003, respectively, VTA and Staff filed opening and reply briefs addressing the jurisdiction issue in this proceeding, and this matter was submitted. However, although submission was not formally set aside, issuance of the Commission's decision was deferred pending a decision by the Court of Appeal, Sixth Appellate District, in its docket H026101, on the jurisdiction issue. (See "Background" below.)

3. Background

The OII sets forth two independent statutory sources of jurisdiction as the basis for Commission review of VTA's proposed construction at this crossing: (1) § 1202, and (2) § 99152. After the OII was issued, in a separate proceeding (Application (A.) 01-01-003) involving another VTA crossing and the same jurisdiction issue, the Court of Appeal, Sixth Appellate District, in its decision filed on November 22, 2004, in docket H026101, held "Under the circumstances, we find that §§ 1201 and 1202 do not apply to the VTA. Therefore, while the Commission has safety jurisdiction over the VTA's light rail transit crossing under § 99152, the Commission does not have exclusive railroad crossing

jurisdiction over these crossings pursuant to §§ 1201 and 1202.” (*Id.* p. 21.)⁶

Accordingly, the Commission has, in this proceeding, taken official notice of the Court of Appeal’s ruling.

4. Discussion

We hold that a transit agency such as VTA must apply for safety review of LRT crossings. We reject VTA’s suggestion that the Commission itself must first make a *prima facie* determination upon the request of Staff that a safety issue exists, and if the Commission finds there is a safety concern, then issue an OII under § 309.7 to compel the LRT system authority to file an application for safety review. Such a procedure is cumbersome, time-consuming, and unworkable. Notwithstanding VTA’s reluctance to file an application for safety review in cases where it has determined there are no safety issues, we point out that unless Staff disputes the safety of the planned crossing, the application is likely to be uncontested and will be promptly approved as such. Furthermore, the Commission has the discretion to determine how best to administer its statutory mandate, and the application procedure under GO 143-B was expressly devised to carry out that mandate. (*See* note 2 above.)

VTA acknowledges that the Commission has the authority to object to the design, construction or operation of an LRT facility, including a crossing, which is, or becomes, unsafe. However, VTA contends that unlike its power over private rail corporations, the Commission has no right to tell local transit districts where or how to construct their LRT systems. VTA’s concern seems to be that (in

⁶ *Santa Clara Valley Transportation Authority v. Public Utilities Com.* 124 Cal. App. 4th 346, 21 Cal. Rptr. 3d 270, rehearing denied (2004 Cal. App. LEXIS 2289, Dec. 14, 2004), review denied (2005 Cal. LEXIS 2855, March 16, 2005).

requiring the filing of an application), the Commission is seeking to expand its safety oversight authority under § 99152, to assume the same exclusive jurisdiction over the placement and construction of entire LRT systems as it has over privately-owned railroad and street railroad corporations under §§ 1201-1205. (*See* VTA's petition to the Court of Appeal for writ of review and request for stay of proceedings p. 19.) We assure VTA, the Commission has no interest in telling VTA where or how to construct its crossings, unless, upon review, it appears to Staff there is a safety concern which it is required to bring to VTA's attention.⁷ VTA's fears that the Commission is attempting to assert authority beyond its safety jurisdiction under § 99152 are unfounded, and this case does not concern assertion of jurisdiction by the Commission beyond safety.

As pointed out by Staff, the filing of an application simply triggers the Commission's safety oversight under § 99152 arising from such construction. As stated in Rule 39, "(w)hen the political subdivision or governmental authority having jurisdiction desires to widen, relocate, or otherwise alter an existing crossing, the application shall show the information required by Rule 38." (20 C.C.R. § 39 of the Commission's Rules of Practice and Procedure.) The transit system's filing of the application will result in the determination by Staff as to whether safety requires "further additions or changes necessary for the purpose of safety to employees and the general public." (§ 99152.) As Staff says, if VTA is truly concerned that it would have to file an application for every modification to its transit line, it need only contact Staff to ask if an application is necessary.

⁷ For example, *see* A.01-01-003, VTA's proposed Hamilton Avenue crossing application, where Staff objected to VTA's proposal for an at-grade crossing at this location because

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Further, we disagree with VTA's argument that under its enabling act and *Brown* (note 4 above), VTA has the threshold authority to determine whether new construction or modifications of a LRT system, including crossings, sufficiently impacts safety as to justify an application to the Commission under § 99152. While VTA is free to "construct, own, operate, control, or use rights-of-way, rail lines, bus lines, stations," etc. (§ 100161(a)), it does so subject to the Commission's statutory safety oversight. Section 99152 specifically requires that "the commission shall enforce the provisions of this section, and the Commission "inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public." Not only is the Commission barred from delegating its safety oversight by statute,⁸ as a matter of public policy, this prohibition against self-regulation is appropriate.

As support for its contention that the Commission's safety jurisdiction is limited, VTA relies on *Brown*, stating that the Commission in this decision provided "that its approval under § 99152 was not necessary for changes which did not involve safety appliances or procedures." VTA misconstrues *Brown*. The facts in *Brown* concerned a demand by complainants that the Santa Clara County Transportation Agency install edge detection strips plus tactile warning and

of public safety concerns, whereupon VTA abandoned its plan to cross at grade and decided to cross Hamilton Avenue by an aerial grade separation.

⁸ The California Legislature has delegated safety oversight of public transit guideway systems to the Commission in response to Title 49 Code of Federal Regulations (CFR) Part 659.1. "This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety of rail fixed guideway systems through a designated oversight agency." (49 CFR Part 659.1.) See also Cal. Pub. Util. Code §§ 100000 *et seq.* establishing the Santa Clara County Transit District.

guidance materials for the visually impaired. *Brown* never held, as VTA would have it, that the Commission's transit safety jurisdiction was limited to "safety appliances and procedures;" nor does the decision contemplate such a holding. As to VTA's refusal to file an application for the North First Street project, we have here addressed the legal issue presented and conclude that VTA should have filed an application with the Commission for safety review of the proposed modifications to this crossing before construction was commenced.

As matters now stand, construction is complete at the crossing at issue. We are pleased that VTA provided Staff with construction plans and the necessary California Environmental Quality Act documentation for the Commission to fulfill its duties as a responsible agency. Also, Staff has inspected the project, and there are no safety issues remaining. Therefore, we conclude that no useful purpose would be served by requiring VTA to file an application for safety review of this project at this time since our review in this proceeding was equivalent to the review we would conduct upon the filing of an application. However, in the future, we expect VTA to consult Staff on all new projects and provide Staff with copies of its construction agreements and plans in advance of construction, as it has done in the past.

VTA, in its appeal of the Presiding Officer's Decision (POD), argues that for minor modification to its LRT system it should not have to file a formal application where (1) there are no safety issues, or (2) where safety issues Staff identifies can be corrected, if VTA agrees. If VTA disagrees, then VTA should file an application for adjudication of the issue by the Commission.

We agree with VTA on the desirability of avoiding unnecessary formal proceedings for safety review of minor modifications, and we will implement a waiver procedure to address these concerns. Specifically, where Staff and VTA

have agreed that a particular modification raises no safety issue, or if there is such an issue and they have stipulated to a solution, Staff shall prepare a resolution recommending that we waive the application requirement. The draft resolution shall set forth the circumstances justifying the waiver, so that the Commission can expeditiously fulfill its review responsibilities under § 99152.

5. Procedural Matters

We affirm the Commission's preliminary determination that this is an adjudicatory proceeding, and the Commission's rules for *ex parte* contacts should apply.

6. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge and presiding officer in this proceeding.

7. Disposition of Appeal

On May 13 and 16, 2005, Staff and VTA each appealed the Presiding Officer's Decision (POD) pursuant to Rule 8.2 of the Rules of Practice and Procedure. On May 31, 2005, VTA filed a response to Staff's pleading.

As discussed in the POD, the central issue is VTA's contention that it alone should decide whether to file an application pursuant to the Commission's transit safety oversight under § 99152. VTA argues that if it is not permitted to determine whether to file an application with the Commission, it would be required to file an application for "every change in structure." According to VTA, if there are no safety implications from the planned modifications, there should be no application requirement. VTA submits that in order to avoid arbitrary or capricious decision-making from Staff, and to avoid an abuse of its own discretion, the Commission must require Staff to support Staff's requests for

modification applications with reference to specific safety concerns and applicable industry standards.

Staff agrees that (1) the requirement for filing an application pursuant to the Commission's transit safety oversight under § 99152, and (2) the transit authority's desire to make minor modifications to its systems without an application, calls for a balancing of these two competing interests. However, Staff contends that the POD attempts to address these interests by requiring applications to be filed upon the request of Staff, instead of ordering LRTs to make such applications in all cases. According to Staff, this would be an improper delegation of the Commission's authority to Staff. Furthermore, Staff believes this might place the burden of discovering such modifications on Staff, without input from VTA. VTA agrees with Staff only to the extent that allowing Staff to determine when an application should be filed would constitute an improper delegation of the Commission's authority to Staff.

The parties' discourse on delegation is well taken. Neither we nor the parties want formal proceedings (applications or investigations) to inquire into minor modifications. The initial task is to separate major from minor modifications, and in that regard, as discussed below, there has been progress since this proceeding started.

Staff and VTA generally agree that major crossing modifications, including expansions, technical enhancement and rebuilds, are subject to Commission review under either the formal application process or GO 88-B.⁹ However, it is

⁹ GO 88-B is not mentioned in the POD. After a comment period of approximately six months starting in July 2003, and participation by Staff and VTA, GO 88-B was adopted on January 8, 2004. Thus, GO 88-B was adopted after the OII was issued

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the marginal cases where there is no such agreement. According to VTA, Staff offered no means to resolve any threshold dispute short of an OII process, which VTA would prefer to avoid. While VTA agrees that GO 88-B is available to obtain expedited safety review for certain categories of crossing modifications, VTA believes GO 88-B is strictly procedural and does not answer the substantive question of whether a given planned modification might sufficiently affect crossing safety as to require Commission review.

On the other hand, Staff says that all the POD need require of VTA is that VTA submit its construction agreements and plans to the Commission in advance of construction so the Commission may meet its safety oversight responsibilities under law. Staff points out that an application would not normally be required unless a party submits a protest.

We appreciate VTA's concerns and agree that a workable procedure for addressing marginal projects should be available. Also, we agree with VTA on the desirability of avoiding unnecessary applications or investigations for safety review of marginal projects. However, we reject VTA's contention that it alone should decide whether there is a safety issue that requires the filing of an application (or a GO 88-B request). As it has done in the past, VTA must continue to provide Staff with its construction agreements and plans in advance of construction.

(September 18, 2003) and after the OSC hearing was held (October 16, 2003). GO 88-B is a substantial expansion of GO 88-A, which did not categorically cover the crossing modification in this proceeding. GO 88-B provides an expedited procedure for review of specific categories of crossing modifications, both separated and at-grade, which are exempt from further CEQA assessment if approved by the interested parties, including Commission Staff.

We conclude that for minor modifications to a LRT system, where Staff and VTA have agreed that a particular modification raises no safety issue, or if there is such an issue and they have stipulated to a solution, Staff should prepare a resolution recommending that the Commission waive the application requirement. The draft resolution should set forth the circumstances justifying the waiver, so that the Commission can expeditiously fulfill its safety review responsibilities under § 99152. Where there is no agreement between Staff and VTA on safety issues, Staff shall notify VTA that it should file an application to initiate the Commission's safety review under § 99152. The POD is modified accordingly.

Findings of Fact

1. This OII was issued for the purpose of investigating VTA's refusal to file an application with the Commission for widening the I-880 overpass at North First Street in the City of San Jose over VTA's LRT line.

2. The OII, as issued, sets forth two independent statutory sources of jurisdiction as the basis for review of VTA's proposed construction: (1) § 1202, and (2) § 99152.

Conclusions of Law

1. While the Commission has safety jurisdiction over the VTA's light rail safety appliances and safety procedures (including transit crossings) under § 99152, the Commission does not have exclusive railroad jurisdiction over these crossings pursuant to §§ 1201 and 1202. The OII should be narrowed accordingly.

2. Under the Commission's § 99152 authority, as reflected in GO 143-B, VTA is required to file an application or a GO 88-B request for safety review of any

proposed modifications to its transit line crossings before it commences construction.

3. The Commission's safety authority under § 99152 does not permit VTA to decline to file an application or a GO 88-B request for safety review of a LRT construction project even if VTA determines and thereafter asserts that there is no safety issue.

4. Since construction has been completed at VTA's North First Street project, and our safety review in this instance was equivalent to the review we would conducted upon the filing of an application, no useful purpose would be served by requiring VTA to file an application for safety review of this overpass widening project.

5. VTA should continue to provide Staff with copies of its construction agreements and plans related LRT crossing modifications in advance of construction so that the Commission may fulfill its responsibilities under § 99152.

6. For minor modifications to a LRT system, where Staff and VTA have agreed that a particular modification raises no safety issue, or if there is such an issue and they have stipulated to a solution, Staff shall prepare a resolution recommending that we waive the application requirement. The draft resolution shall set forth the circumstances justifying the waiver, so that the Commission can expeditiously fulfill its review responsibilities under § 99152. Where Staff and VTA are unable to reach agreement, then VTA should file an application so that the Commission may adjudicate the matter.

O R D E R

IT IS ORDERED that:

1. Santa Clara Valley Transportation Authority (VTA) shall file an application or a General Order (GO) 88-B request pursuant to § 99152, for safety review of all new construction or major modifications to its light rail transit (LRT) line crossings.

2. For minor modifications to a LRT system, where the Commission's Consumer Protection and Safety Division (Staff) and VTA have agreed that a particular modification raises no safety issue, or if there is such an issue and they have stipulated to a solution, Staff shall prepare a resolution recommending that the Commission waive the application requirement. The draft resolution shall set forth the circumstances justifying the waiver, so that the Commission can expeditiously fulfill its review responsibilities under § 99152.

3. Where there is no agreement between Staff and VTA on safety issues, Staff shall notify VTA that it should file an application to initiate the Commission's safety review under § 99152.

4. VTA's appeal of the Presiding Officer's Decision is granted in part and denied in part.

5. Investigation 03-09-030 is closed.

This order is effective today.

Dated _____, at Los Angeles, California.